79-1493

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

LOUIS F. PELLON and VINCENT D. CARILLI,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

LOUIS F. PELLON and VINCENT D. CARILLI,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Louis F. Pellon and Vincent D. Carilli petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, infra) is not yet reported. The opinion of the district court (App. B, infra) is reported at 475 F.Supp 467. The district court's denial of petitioners' motion for reargument is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether this Court should resolve an apparent split of authority between the Second

and Third Circuit Courts of Appeal regarding the immunity effect of a no-prosecution or cooperation agreement entered into with the Government.

2. Whether an individual can implicitly waive his privilege against self-incrimination by entering into a no-prosecution or cooperation agreement with the Government which makes no reference to the alleged Fifth Amendment waiver.

Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

On March 14, 1979 petitioners, together with 12 other defendants were indicted and charged with having violated the federal narcotics laws. On April 6, 1979 petitioners filed separate motions to dismiss the indictment or, alternatively, to suppress certain evidence on the grounds that the charges were barred by an immunity agreement that had previously been entered into with the Government, and

that the evidence had been obtained as a result of the Government's improper use of disclosures made, and testimony given, by petitioners pursuant to that agreement. On August 3, 1979, following a lengthy evidentiary hearing, the district judge, in a thirty-six page opinion, denied the motions. (App. B, infra) On August 13, 1979, petitioners filed a joint motion for reargument which was orally denied by the district judge on August 20, 1979. Thereafter, on August 22, 1979, pursuant to a plea agreement with the Government, and with the approval of the Court, petitioners Pellon and Carilli pled guilty to, respectively, violations of 21 U.S.C. §§841 and 848, preserving their right to appeal the denial of the pretrial motions.

On November 2, 1979, Mr. Pellon was sentenced to a term of imprisonment of seventeen and one-half years and was fined $100,000; Mr. Carilli was sentenced to ten years' imprisonment, to be followed by a ten-year special parole term. Petitioner Pellon is currently serving his sentence. On March 6, 1980, the Court of Appeals denied the Government's motion for the forthwith issuance of the mandate as to Mr. Carilli and granted his cross-motion for a stay of the mandate pending determination of the instant petition.

1. On December 11, 1977, petitioner Carilli was arrested at the Miami International Airport upon his return from Colombia, South America, when customs officials found a quantity of cocaine strapped to his body. Following his

arraignment, in the Southern District of Florida, Mr. Carilli returned to New York and together with petitioner Pellon met with their attorney, Howard Ruckeyser. Immediately thereafter, Mr. Ruckeyser contacted Drug Enforcement Administration (hereinafter "DEA") Special Agent Frederick Marano, and told him that he had a client who was in some difficulty and might be able to provide important information to the DEA. A meeting was held in Mr. Ruckeyser's office between petitioners, Special Agent Marano and two fellow agents. Mr. Ruckeyser told the agents that his clients could provide information concerning one Ernesto Castrillon proving that Mr. Castrillon was a major trafficker in cocaine into the United States. As yet, the Government had no information in its files

concerning Mr. Castrillon; in fact, this was the first time that his name had been brought to the attention of the DEA. (TR. 20-21, 25, 30-31, 36-39, 244-253) No formal agreement was reached, but it was understood that negotiations with the United States Attorney's Office for the Southern District of New York would be undertaken with a view toward the Government's obtaining petitioners' cooperation.

2. As a result of those negotiations, petitioners entered into the following agreement with the United States Attorney's office for the Southern District of New York:

"(1) This agreement is made on this 6th day of April, 1978, and the parties to this Agreement are the United States Attorney's

Office for the Southern District of New York, the Drug Enforcement Administration (hereinafter referred to as "USA" and "DEA") both agencies of the United States of America associated with the Executive Branch of the Government, LOUIS F. PELLON, and VINCENT D. CARILLI.

(2) LOUIS F. PELLON is named as a defendant in an Indictment originating in the United States District Court of the Southern District of New York, No. 78 Cr 155 (MEL), wherein he is charged with four counts of violating the laws of the United States of America.

(3) VINCENT D. CARILLI is named as a defendant in an Indictment originating in the United States District Court for the Southern District of Florida, No. 78-53-CR-CA wherein he

is charged with two counts of violating the laws of the United States of America. That Vincent D. Carilli on March 30, 1978, entered a plea of guilty to Count One of said Indictment in exchange for dismissal of Count Two of said Indictment. That a pre-sentence investigation is underway in respect to Vincent D. Carilli and in approximately one month from the date of sentencing (appoximately April 30, 1978), Carilli will be sentenced by the Honorable C. Clyde Adkins, Judge of the United States District Court of the Southern District of Florida.

(4) The USA's office and the DEA have additional facts to support additional Indictments against Pellon and Carilli, which indictments have not yet been forthcoming. In

addition, the charges hereinabove mentioned lodged against Pellon by indictment name Carilli as an unindicted co-conspirator.

(5) The USA's office and DEA are interested in obtaining the cooperation and the information known to Louis F. Pellon and Vincent D. Carilli concerning Ernesto Castrillon for the purpose of determining whether Castrillon as well as any other person or persons working with Castrillon has violated or is violating the narcotics laws of the United States of America.

(6) Louis F. Pellon and Vincent D. Carilli have agreed to cooperate, supply information and work with the USA's office and the DEA to affect the aforesaid purpose. In addition, they agree to follow any and all

directives from the USA's office and the DEA regarding this investigation and to testify in any resulting criminal trial, if necessary.

(7) In exchange for the cooperation of Louis F. Pellon and Vincent D. Carilli, the USA's office agrees not to prosecute Louis F. Pellon under the charges encompassed in the present outstanding indictment against Louis F. Pellon as previously stated, nor to bring any further charges against Louis F. Pellon, Vincent D. Carilli, or their families for any violation of the narcotics laws or passport laws of the United States of America presently known to the USA and DEA so long as, as a result of the cooperation of Louis F. Pellon and Vincent D. Carilli, Ernesto Castrillon is arrested and as result of said arrest, there

is confiscated approximately 25 pounds of cocaine.

(8) Furthermore, if as a result of the cooperation of Louis F. Pellon and Vincent D. Carilli stated herein, Ernesto Castrillon is arrested and approximately 25 pounds of cocaine are confiscated, agents of the DEA knowledgable about the facts and circumstances surrounding this agreement and the cooperation of Vincent D. Carilli shall make known the full extent of Vincent D. Carilli's cooperation to the USA's offices for the Southern District of New York and the Southern District of Florida, and the USA's for the Southern District of New York shall make such facts known to the sentencing judge in the Southern District of Florida. Also, if asked by the Probation Department of the

Southern District of Florida, knowledgable DEA agents will make these facts known to that Probation Office.

(9) In the event that Ernesto Castrillon is not arrested and approximately 25 pounds of cocaine confiscated, then the USA may, in its discretion, go forward with the prosecution of Louis F. Pellon under the present existing indictment and may file additional charges as it judges appropriate, which are not connected with the activities of Louis F. Pellon and Vincent D. Carilli in their cooperation with the Government.

(10) If in the reasonable judgment of the DEA and USA, Louis F. Pellon and Vincent D. Carilli cooperated fully with the DEA in order to effectuate the arrest of Ernesto Castrillon

and confiscation of approximately 25 pounds of cocaine, but for some reason beyond Louis F. Pellon's and Vincent D. Carilli's control, said arrest and/or seizure is not accomplished, the DEA will make known to the aforesaid USA's offices, and the USA's office for the Southern District of New York will make known to the appropriate court of law the full extent of the cooperation of Louis F. Pellon and Vincent D. Carilli, and neither the DEA nor the USA's office for the Southern District of New York will make any recommendation at the time of sentencing. This paragraph applies to the charges presently pending against Louis F. Pellon and Vincent D. Carilli in regard to trafficking in narcotics or passport laws.

(11) No later then two weeks after the arrest, if any, of Ernesto Castrillon, the DEA and the USA shall be responsible for returning to Louis F. Pellon his passport and naturalization papers presently within the possession and control of the DEA in Miami, Florida, if the Court agrees. Said passport and naturalization papers shall contain no restrictions other than those fixed by law with respect to such documents in the possession of any United States citizen.

(12) Immediately upon the arrest, if any, of Ernesto Castrillon, the DEA and the USA shall be responsible for returning to Louis F. Pellon, the Pellon Development Company, and Seamus International, all personal papers, business and corporate papers, documents and

records seized from said parties, if any, or obtained by subpoena from the accountant of said parties.

(13) After this agreement is signed, the DEA and the USA shall forthwith be responsible for supplying to Howard Ruckeyser and to Jack Attias a copy of the tape recording of Vincent Carilli's debriefing by DEA on February 2, 1978, in the presence of Howard Ruckeyser.

(14) This agreement is premised upon truthful cooperation during all phases of this investigation, including any grand jury or court proceeding which may arise from this investigation."

This agreement, although mutually drafted by counsel for the petitioners had been substantially revised, by the Government as to its key paragraphs.*

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*The district judge found this agreement to be both "vague and incredibly badly drafted". (App. B, infra, p. 28a)

3. Immediately upon execution of the agreement petitioners, as the Government had requested and directed, met with Mr. Castrillon; as a direct and causal result of their combined efforts, the Government arrested Mr. Castrillon within the Southern District of New York and seized from him 26 pounds of cocaine. (TR. 244-253) Following Castrillon's indictment, the Government determined that the testimony of both petitioners would be required at Mr. Castrillon's trial. Petitioners' attorneys advised the Government that their clients needed formal use immunity since it was anticipated that each would be asked, on cross-examination, questions with respect to matters outside the April 6th agreement. Government counsel, however, rejected this request and advised petitioners

that they each had to testify, and that if they refused, they would be in breach of the agreement. (TR. 1418-1431, 1462-66) At the hearing below Assistant United States Attorney JoAnn Harris, who had negotiated the agreement for the Government, testified that under her interpretation of the agreement petitioners could not invoke their Fifth Amendment privilege against self-incrimination regarding anything that had been disclosed or done by them pursuant to their agreement with the Government, and that they could assert their privilege only with respect to those matters not disclosed by them to the Government. (TR. 1467-1470)* As a direct and causal result of petitioners' cooperation and testimony, Mr. Castrillon was

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*At Castrillon's trial, Mr. Carilli appeared as a Government witness and invoked his Fifth Amendment privilege with respect only to those areas concerning which he had not made disclosures to the Government in connection with his cooperation agreement. Mr. Pellon, while testifying in a technical sense as a witness called by the defense, did likewise. (TR. 432-33, 1733-34, 1746-47)

convicted and sentenced to a nine-year term of imprisonment. Immediately after his conviction, Mr. Castrillon sought to cooperate with the Government. During the ensuing negotiations, he disclosed that Mr. Pellon and Mr. Carilli had, in February, 1978, received a substantial quantity of cocaine from him, in Orlando, Florida. Castrillon also stated his belief that they were still engaged in illegal narcotics activity. (TR. 433-34) Following these revelations, a formal written cooperation agreement was entered into between the Government and Castrillon.* Relying on Castrillon's information, the Government together with the Westchester County District Attorney's Office and the Mount Vernon Police Department undertook further investigation of petitioners. The DEA agents

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*Very shortly thereafter, in September 1979, Mr. Castrillon escaped from the Metropolitan Correctional Center. He remains a fugitive.

fully disclosed to the local authorities everything they had learned from Castrillon together with information obtained from petitioners during their cooperation. (TR. 1678-1680, 1686-88, 1690-93) A determination, was made to employ State court-authorized electronic surveillance of petitioner Pellon's telephones. Special Agent Marano's affidavit in support of the initial application for court approval disclosed all of this information.* The investigation culminated in the instant prosecution of Messrs. Pellon and Carilli.

4. Following the evidentiary hearing below the district judge denied the petitioners' pretrial motion on the grounds that (a) the agreement immunized only "known violations"

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*Suppression of the evidence derived from the electronic surveillance was sought as an alternative form of relief in the motion seeking dismissal of the indictment.

and (b)"... the Government's promise..., not to prosecute for certain known offenses or for actions aiding in Castrillon's arrest, clearly do not amount to a promise of transactional or use immunity." (App. B, infra, pp. 47a, 55a)

Petitioners moved for reargument, asserting that if, as the district court had found, and as the Government had advised them prior to their testimony, they could not under the agreement, have refused to testify at the Castrillon trial, their testimony must have been immunized. They further contended that the Government's subsequent use of Mr. Castrillon's information, derived from petitioners' cooperation was improper. In denying the motion, the district judge found that petitioners could not have asserted their Fifth Amendment privilege at

the Castrillon trial because their agreement with the Government contained a no-prosecution promise, and "...the Fifth Amendment privilege is designed to prevent the use of a person's own testimony from incriminating himself. It is not designed to prevent the setting off of a chain of events that could ultimately lead to him being prosecuted for something unrelated at some time." (TR. 2202)

On February 15, 1980 the court of appeals affirmed the district court's denial of the pretrial motions relying on the district judge's written opinion. (App. A, infra, p. 2a)

REASONS FOR GRANTING THE PETITION

This case presents two important questions concerning the nature and scope of the Fifth Amendment privilege against self-incrimination:

first, a resolution of the split of authority between the Second and Third Circuits as to the immunity consequences of a Government no-prosecution or cooperation agreement. While the Government has available to it the Congressionally enacted use immunity provisions of 18 U.S.C. 6002, et. seq., the constitutionality of which has been ratified by this Court, see Kastigar v. United States, 406 U.S. 411, practice has shown that those provisions are being widely ignored by United States Attorney's offices throughout the nation in favor of makeshift cooperation agreements, see authorities cited in United States v. Arroyo-Angulo, 580 F.2d 1137, 1146 (C.A. 2). This is so because the more formal immunity provisions relate only to testimonial cooperation, far removed from the

day-to-day law enforcement exigencies faced by prosecutors and agents.

The experience of the case below as well as that in United States v. Quatermain bear witness to the need for this Court to reconcile the divergent views of the Second and Third Circuit Courts of Appeal as to the constitutionally imposed ramifications of such agreements as well as the burdens incumbent upon prosecutors who seek Fifth Amendment waivers from potentially cooperating individuals.*

. The second issue which requires review by this Court is whether an individual can be presumed to have implicitly waived his privilege against self-incrimination by entering into such an agreement which makes no reference to the Fifth Amendment. Both issues are especially

*The district court opinion is reported at 467 F.Supp. 782 and the Circuit Court of Appeals opinion, decided on January 24, 1980, is not yet reported. We are advised by Mr. Quatermain's counsel that a petition for a writ of certiorari was filed on his behalf on March 7, 1980 (79-6204)

important because of the increased frequency with which the Government has made use of such agreements; the first of these issues has generated conflicting courts of appeals decisions which render review by this Court appropriate both because of the issue itself and in order to resolve the conflict between the circuits.

1. The Fifth Amendment privilege against self-incrimination, critical to the preservation of liberties, "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, supra, 406 U.S. at 444-445. See also, Counselman v. Hitchcock, 142 U.S. 547, 564; Ullman v. United States, 350 U.S. 422, 438-39; United States v. Kurzer,

534 F.2d 511, 516 (C.A.2). Accordingly, the privilege has been zealously safeguarded by the courts. Kastigar v. United States, supra, 406 U.S. at 445. See also, Miranda v. Arizona, 384 U.S. 436, 443-444; Boyd v. United States, 116 U.S. 616, 635. This Court has been extremely cautious in finding a waiver of such a privilege; waiver cannot, of course, be presumed. Miranda v. Arizona, supra, 384 U.S. at 476. Thus, the courts "must indulge every reasonable presumption against waiver of fundamental constitutional rights." Emspak v. United States, 349 U.S. 190, 196.

The district court's opinion, relied upon by the court below, is in the teeth of Kastigar v. United States, supra, in mischaracterizing the privilege as one "not designed to prevent

the setting off of a chain of events that could ultimately lead to him being prosecuted for something unrelated at some time". (TR. 2202) When viewed in the context of the argument advanced by the petitioners in the district court, and of the facts established during the evidentiary hearing, this incorrect analysis of the nature and scope of the privilege thwarted a just determination of the issues below.

There is no question, and the district court correctly found, that absent petitioners' cooperation, Castrillon could not have been prosecuted and convicted and, further, that without Castrillon's resulting cooperation the instant prosecution could not have occurred. (App. B, infra, p.51a,fn.9) If petitioners, through their cooperation agreement, received immunity,

they were protected from the fruits of their cooperation, i.e., Mr. Castrillon's cooperation. United States v. Kurzer, supra, 534 F.2d at 516. This is axiomatic because in order to compel one's testimony the immunity protection afforded the witness must, constitutionally be coextensive with the privilege. Kastigar v. United States, supra, 406 U.S. at 453.

In affirming the district court's opinion the circuit court agreed with the district judge's conclusion that a no-prosecution or cooperation agreement cannot be equated with a grant of use immunity.* (App. B, infra, p. 56a,57a,fn.11) This decision is in direct conflict with the decision of the Third Circuit, which has held to the contrary. United States v. Quatermain. In Quatermain, on facts strikingly

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* This holding is inconsistent with an earlier decision of the court below which refused to supplant the privilege against self-incrimination where it appeared that the Government would not prosecute the witness based upon his disclosures. United States v. Miranti, 253 F.2d 135, 139. (C.A.2)

analagous to those below, the district court, in interpreting the legal consequences of such an agreement held:

> "It may be argued that the defendant's testimony was not compelled by court order and constitutional considerations and statutory analogies need not apply in this case. This Court, however, is of the view that the defendant gave up a constitutional right not to testify and assisted the Government. He should not be presumed to have done so for less than his constitutional entitlement, absent any evidence that he was informed of the scope of that right by the Government's attorney or that he knowningly and intelligently waived it."

United States v. Quatermain, 467 F.Supp. 782, 788 (E.D. Pa.). The Court of Appeals, in reversing the district court's order dismissing the indictment, expressly assumed the correctness

of the district judge's holding that the agreement did confer upon the defendant use immunity protection but found that such protection does not relate to crimes which are committed in futuro.

Certainly a no-prosecution promise by the Government is equivalent to an informal grant of transactional immunity, since their practical effect is identical. Thus, the issue to be resolved is whether such a promise carries with it the derivative or use aspects traditionally associated with formal grants of transactional immunity. Kastigar v. United States, supra, 406 U.S. at 453; Counselman v. Hitchcock, supra, 142 U.S. at 586.

This question, is critically significant since the Government cannot avail itself of the formal immunity provisions, under 18 U.S.C. §6002, et. seq., except in situations where it wishes to compel one's actual testimony as distinguished from non-testimonial cooperation. Accordingly, the use by United States Attorneys of agreements, such as was used herein, has become increasingly more frequent, making the current conflict between the Second and Third Circuit Courts of Appeal sufficiently important to warrant resolution by this Court.

2. The April 6th agreement, as entered into between petitioners and the Government, makes absolutely no reference to the Fifth Amendment. Nor does the agreement provide that the petitioners were not being provided "immunity"

protection. Nonetheless, the district judge, despite finding the agreement to have been "vague and incredibly badly drafted", interpreted it as providing nothing more than "a simple agreement not to prosecute certain known violations in return for their cooperation." (App. B, infra, pp 28a, 59a).

We believe that the district court's analysis was clearly wrong, particularly when viewed in light of its denial of the petitioners' joint motion for reargument. During the proceedings attendant thereto, the district judge found that the agreement required petitioners to testify at the Castrillon trial and that they had no Fifth Amendment privilege as to whatever they had done in assisting the Government in making its case against Castrillon. (TR. 2192-

2211) Simply stated, the district judge viewed petitioners as having implicitly waived their privilege against self-incrimination, by entering into the April 6th agreement even though the agreement made no reference to the Fifth Amendment.

This interpretation, involving as it must a finding that petitioners testified at the Castrillon trial naked of any immunity protection cannot withstand analysis. First, the privilege against self-incrimination may not be waived by contract. Morgan v. Thomas, 448 F.2d 1356 (C.A. 5); cert. denied, 405 U.S. 920.

Second, even if the privilege against self-incrimination could be waived by contract, a contract of this type, replete with ambiguous language of critical dimension cannot suffice

to waive such rights. In Emspak v. United States, supra, 349 U.S. at 196, this Court, in a custodial interrogation setting, found ambigious circumstances to be utterly inconsistent with the concept of waiver, observing that, "(t)o conclude otherwise would be to violate this Court's own oft-repeated admonition that courts 'must indulge every reasonable presumption against waiver of fundamental constitutional rights.'"

Such a waiver cannot be found in the murky, ambiguous language of the document generated by the Government. If the Government intended to secure from the petitioners a waiver of their Fifth Amendment privilege, it was incumbent upon the Government to recognize the critical significance of such a privilege and the significance of explaining to them the waiver itself.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

CIRCUIT COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of February, one thousand nine hundred and eighty.

PRESENT:

HON. JAMES L. OAKES, Circuit Judge

HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge

HON. CHARLES H. TENNEY, District Judge*

UNITED STATES OF AMERICA,	:	
Appellee,	:	
	:	79-1415
v.	:	79-1422
LOUIS F. PELLON and VINCENT D. CARILLI,	:	
Defendants-Appellants.	:	

*Hon. Charles H. Tenney, Senior District Judge of the United States District Court for the Southern District of New York, sitting by designation.

ORDER

Louis F. Pellon and Vincent D. Carilli appeal from judgments of conviction entered on August 22, 1979, in the United States District Court for the Southern District of New York, after both entered pleas of guilty before the Honorable Gerard E. Goettel, United States District Judge. Appellants' court-approved plea agreement specifically reserved their right to appeal from the district court's denial of their pretrial motions to dismiss the indictment, or, in the alternative, to suppress certain evidence obtained through court-authorized electronic surveillance.

Appellants' contention below and their argument on this appeal is that the charges brought against them were barred by virtue of a non-prosecution clause in a Cooperation Agreement entered into by appellants and the government on April 6, 1978. Alternatively, they argue that the Agreement, coupled with certain representations by government prosecutors as to the appellants' right to assert their fifth amendment privilege against self-incrimination when testifying pursuant to the Cooperation Agreement at the trial of Ernesto Castrillion, constituted a grant of use immunity equivalent in scope to the immunity authorized in 18 U.S.C. §6002.

We are in substantial agreement with the reasons for denying the motions set forth in Judge Goettel's comprehensive and well-reasoned opinion below, 475 F. Supp. 467 (S.D.N.Y. 1979). Moreover, we note that United States v. Quatermain, 467 F. Supp. 782 (E.D. Pa. 1979), relied upon heavily by appellants, has been recently reversed by the United States Court of Appeals for the Third Circuit.

United States v. Quatermain, No. 79-1253 (3d Cir. filed Jan. 14, 1980).

The judgments appealed from are AFFIRMED.

HON. JAMES L. OAKES U. S. C. J.

HON. ELLSWORTH A. VAN GRAAFEILAND U. S. C. J.

HON. CHARLES H. TENNEY U. S. D. J.

APPENDIX B

DISTRICT COURT OPINION

O P I N I O N

78 Cr. #164 (GLG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

LOUIS F. PELLON,
FRANCES PELLON,
MARIA PELLON VILLAAMIL,
VINCENT D. CARILLI,
HILTON MATOS, a/k/a "John,"
NICHOLAS R. ORLANDO,
LONNIE HOWARD HILL,
KENNETH SCHERRER,
SIDNEY POPE, a/k/a "Spencer,"
JAY GRAY,
FRANK PEREIRA,
FRANK MAURICE,
MICHAEL SMITH, a/k/a "Frankie Royce"
and ELIZABETH LUGO HAYES,

Defendants.

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G O E T T E L, D. J.:

Narcotics conspiracy investigations often reveal unusual stories, but it is doubtful that any prior case has had as bizarre a history as this one. Indeed, the scenario that has emerged from the numerous pretrail motions and lengthy hearings in this case is so extraordinary that, if submitted as a script for a movie under a title such as "The Colombian Connection," it would be summarily rejected as too implausible for consideration.

Act I - "Pretenses and Promises"

In a sense the story started at Kennedy Airport on December 10, 1977, when some Customs officers noted that a returning passenger, who had already cleared customs inspection, was extremely nervous. The man, Louis F. Pellon, Spanish born, was ostensibly a

respectable real estate developer and contractor in Westchester County. Whether his nervousness was real or feigned is debatable, but that he had reason to be apprehensive is clear. In any event, during his brief discussion with the Customs agents Pellon indicated that he might have some information about narcotics smuggling and would subsequently get together with them to discuss it. Pellon's claim of knowledge was well founded. In fact, the following day his business partner and personal associate, Vincent D. Carilli, was arrested at the Miami International Airport while returning to this country from Colombia, South America, when Customs officials found a pound of pure cocaine strapped to his body.

Pellon's proposed meeting with Customs agents did not immediately take place. Instead, both Pellon and Carilli

(who was by then free on bail) talked with attorney Howard Rukeyser, who had represented their businesses in civil matters in Westchester County. Rukeyser in turn arranged a meeting with Special Agent Fred Marano of the Drug Enforcement Administration (DEA), an official with whom he had previously dealt on behalf of other clients.

By a strange coincidence, Marano was one of a group of agents who already had an undercover investigation of Carilli going in Westchester County. In October of 1977, one Harold Lane, a convicted felon awaiting sentencing on a crime not related to narcotics, had advised Assistant United States Attorney JoAnn Harris that he believed he could assist the Government in uncovering a local cocaine ring. Marano's group was assigned the matter. By December, 1977, however, the DEA agents had no indication

that Carilli was a major or important drug dealer and, while they had heard that he had a Spanish partner, they knew very little about Pellon.

The meeting between Rukeyser, his clients Pellon and Carilli, and the DEA agents proved quite dramatic. After the defendants were given Miranda warnings, Pellon indicated that he and his partner could be instrumental in setting up the arrest of a Colombian smuggler named Ernesto Castrillion, and that Castrillion could be caught while in possession of over 500 pounds of pure cocaine. (The wholesale value of such an amount would be many millions of dollars.) Pellon also advised the agents that Castrillion and his associates owned ships and airplanes that were used to smuggle cocaine, marijuana and contraband coffee into this

country.[1] Indeed, Pellon reported, the Colombians had just smuggled over a hundred pounds of cocaine into Miami.

In exchange for facilitating this exceptional seizure, Pellon and Carilli wanted the Florida charges against Carilli dropped. Although somewhat skeptical about the ability of their informants to deliver, the DEA agents were understandably excited over the prospect of catching a major Colombian cocaine dealer who, they were told, was responsible for one-third of all illicit shipments into the United States. Reluctant to play all their cards, however, the agents did not advise Pellon and Carilli of their pending undercover investigation in Westchester.

1/ During these discussions, there were also indications that Pellon and Carilli had been guilty of passport violations, a fact which became more apparent as time progressed.

The DEA could not independently proceed on Pellon and Carilli's enticing proposition. Carilli was already under federal indictment in Florida, and the United States Attorney's Office for the Southern District of New York was already aware, through the Lane investigation, that Carilli had sole an ounce of cocaine in this district, for which he would probably be indicted here. Consequently, a meeting was scheduled for all the parties, including representatives of the United States Attorney's Office, for December 21st.

Rukeyser and Pellon, however, without giving an explanation, cancalled that meeting. Instead, they met with the Customs agents, as Pellon had originally planned. (Carilli was not present at this meeting and no disclosure of his Florida indictment was made.) Pellon made the same offer to help the Government

catch a major Colombian cocaine dealer, but his quid pro quo this time was different. He wanted, rather than assistance for Carilli, money and the airplane which he said Castrillion would be using to smuggle his cocaine into Florida. Pellon also told Customs that he did not want his information passed on to DEA agents because he questioned their integrity,[2/] and that he wanted to trap the Colombians because they had previously bilked him out of a large sum of money and he was seeking revenge. The Customs officials, somewhat skeptical, subsequently talked with Pellon only over the telephone, and when he boldly insisted upon advance payment for his assistance and free reign to operate

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2/ A copy of a report concerning this interview was disseminated by Customs agents to the DEA, but it did not come to the attention of the DEA group then investigating Pellon and Carilli.

without interference in Colombia, they terminated their contracts with him.

Meanwhile, Pellon's continuing negotiations with the DEA agents had become difficult. He had strong ideas about how the Castrillion caper should be staged, and the agents found his intransigence unacceptable. Negotiations between them gradually broke off. Rukeyser, however, continued to negotiate on behalf of Carilli, and in February, 1978, Carilli provided the DEA and the United States Attorney's Office with some rather interesting information.

As Carilli described it, Pellon had previously been to Colombia in August, 1977, and after some unsuccessful discussions with certain Colombian cocaine dealers, he had been introduced to Ernesto Castrillion. A short time later, Castrillion visited Pellon at his home in Mt. Vernon, New York. He stayed a month with

Pellon and gave Pellon a present of a half a pound of cocaine, as a showing of "good faith." (This half pound of cocaine provided the ounce which was distributed by Carilli and Pellon to Harold Lane in September of 1977.)

Carilli went on to say that Castrillion had promised to supply Pellon substantial quantities of cocaine during the latter part of that year. (Whether he did so is a matter still in dispute.) According to Carilli's story, he and Pellon went to Colombia, armed, and negotiated with Castrillion for a large quantity of cocaine. Castrillion supposedly returned to Miami in December with a substantial quantity, which was either distributed to Cubans in Miami, or to Pellon.

Prior to his cooperation with DEA, Carilli had indicated to Lane and other undercover DEA sources that he thought

he might be in a position to deliver substantial amounts of cocaine in the near future. The agents also had information that Carilli's father, Armand, was involved in the drug trade. In February, when Carilli disclosed his prior activities to the prosecution, the agents did not reveal to him that his story was partially corroborated by their independent undercover investigation.

At the same time that Carilli was supplying the information concerning his and Pellon's cocaine activities, the United States Attorney's Office placed Harold Lane before a Grand Jury. Lane described his cocaine transactions with the Carillis and Pellon, including the delivery of the one ounce of cocaine in 1977, and the boasts of their ability to deliver substantial amounts in the future. Assistant United States Attorney Harris, although interested in the possibility of

developing a larger case, was unwilling to take any steps that might unnecessarily prejudice the cases already secured through Lane's testimony against Pellon and Carilli. Moreover, by this point it had become apparent to everyone involved that only Pellon, if anyone, had the ability to set up the arrest of Castrillion, and Pellon was no longer cooperating with the Government. (Even attorney Rukeyser could not control Pellon's actions during this period.)

The Government thought it had a solution to the problem. With Carilli's statements (which had been tape recorded) and the testimony of Harold Lane, supported by recordings of his telephone conversations with Carilli, the Government felt it had sufficient evidence to indict Pellon, with the possibility that this leverage might induce him to cooperate more readily. The assumption was that

Carilli, in order to get his plea bargain in Florida, would be willing to testify against Pellon. In discussions with Carilli, Ms. Harris had orally agreed to help him with respect to his Florida case in return for his cooperation, and had told him that his testimony must be full, complete and straightforward. She also specifically had declined to promise that Carilli's information would not be used against Pellon. Carilli had also been advised that a written cooperation agreement to this effect would be signed. 3/

The Government's assumption that Carilli would testify against Pellon proved erroneous. Rukeyser failed to produce Carilli for further interviews

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3/ Because of Rukeyser's urging, however, the debriefing of Carilli had gone forward without a written agreement. Eventually, one of the Government's standard cooperation agreements was drafted, but because of Carilli's subsequent failures to cooperate, it was never sent to Carilli.

in the United States Attorney's Office, or for an appearance before the Grand Jury, and Ms. Harris was advised that Carilli had gone to Florida in an effort to work out a new and better deal there for himself. Ms. Harris told Rukeyser that the Government would proceed without Carilli.

A complaint was prepared for the arrest of Pellon in mid-February, 1978. It was based solely upon the statements of Carilli, the Government having up to that point concealed from the defendants its parallel investigation involving informant, Harold Lane. The complaint was filed and Pellon surrendered voluntarily, appearing without an attorney. He was interviewed by Ms. Harris and, in essence, admitted knowing a lot about the cocaine trade, but denied personal involvement. He also specifically refused to answer a number of questions. Efforts

were again made to get Carilli before a Grand Jury, but he continued to be unavailable. At the same time, the DEA became aware, for the first time, that the Mt. Vernon Police Special Investigation Unit had an active narcotics investigation of Pellon and Carilli. Rather than cooperating with the police and pooling information, however, the DEA stubbornly told them to take no steps that might interfere with the ongoing federal investigation.

Carilli's recalcitrance notwithstanding, the Government forged ahead and obtained an indictment against Pellon by placing DEA Agent Marano before the Grand Jury. He described Carilli's earlier statements incriminating Pellon in cocaine transactions as well as certain passport

violations.[4/] Immediately prior to doing this, however, Harris advised Rukeyser about the additional evidence from the undercover investigation which could be used against Pellon. The indictment was returned on March 7th, charging Pellon with a narcotics conspiracy, possession of the half pound of cocaine received from Castrillion in August of 1977, the distribution of the one ounce of cocaine to Lane, and one passport violations. Carilli was named as an unindicted co-conspirator.

The Government continued its efforts to bolster its case against Pellon by bringing Carilli before a Grand Jury.

4/ Pellon had a lady friend named Elizabeth Lugo Hayes, a codefendant in this case. Mrs. Hayes was apparently married at one time to William Joseph Hayes. Pellon had obtained his passport and was using it on occasion, as well as having obtained a new passport for himself (claiming he had lost his one), while also giving one of these passports to Carilli.

Ms. Harris became convinced that Carilli's whereabouts were being concealed by attorney Rukeyser and Pellon, for Pellon's benefit. In fact, Carilli had returned again to Florida with Pellon and they had become involved in some unusual transactions that were soon to become known, at least partially, to the prosecution.

On March 14, 1978, having returned hastily from Florida, Carilli was finally called before a Grand Jury. He appeared with a new actor in the drama, Florida attorney Jack Attias, who was representing Carilli on the federal charges in that state. Carilli acknowledged recently having been in Miami with Pellon, denied that there had been a concerted effort to keep him from appearing before the Grand Jury, but claimed privilege with respect to certain events which had occurred during his travels. A couple of days later, immediately prior to

Pellon's arraignment on the indictment, Pellon appeared with both Attias and Rukeyser, and the attorneys informed the United States Attorney's Office that they were jointly representing both Pellon and Carilli in their existing legal problems. They again offered cooperation and proposed the deal that had been discussed a few months earlier. This new conciliatory effort, of course, did not surprise Ms. Harris since she acknowledged that indicting Pellon might put "leverage" on him to cooperate.

As the discussions became more serious, the Chief of the Narcotics Unit of the United States Attorney's Office, James Lavin, entered the picture. The Government attorneys were informed that Castrillion was in Florida and that he could be caught with 100 to 200 pounds of pure cocaine, as well as, perhaps, his airplane. They were also told,

however, that it was urgent that a deal be struck quickly since the cocaine was being rapidly sold. In exchange for their help, the defendants wanted Pellon's indictment dropped, no additional charges here against Carilli or his father, and assistance with respect to the Florida prosecution of Carilli. The defendants did not explain, nor surprisingly did the United States Attorney's Office inquire, how they knew of Castrillion's presence in Florida, the exact amount of cocaine present, or the rate at which it was being sold.

These facts were not to remain a complete secret long. A day or two later, while the prosecution was in the process of preparing a cooperation agreement, it learned from the Mt. Vernon police that a warrant had been issued in Dade County, Florida, charging Pellon and Carilli with conspiracy to commit

murder and conspiracy to violate the state narcotic laws. The DEA and the Mt. Vernon police cooperated in the arrest of the defendants on the warrant. They learned that the Dade County charges stemmed from an alleged attempt to rip off a large amount of cocaine and to murder the supplier, apparently to avoid paying for it. Further investigation revealed that on March 13th, following a tip from an informant, Dade County authorities had arrested certain associates of these defendants, including Sidney Pope, a defendant in this action, aboard a pleasure fishing vessel in the inland waterway in Miami. At that time the police found several weapons and some heavy chains aboard the vessel which quite plainly would have been suitable for dumping bodies overboard.

After their arrest, Pellon and Carilli immediately denied any intent to

be involved in a murder and claimed that the events in Florida were simply a part of their continuing good faith effort to set up Castrillion's arrest. They claimed, moreover, that the evidence against them on the murder charge was weak and that the case would not be prosecuted in Dade County. They waived extradition and returned to Miami.

Apparently the Dade County authorities confirmed that the case against Pellon and Carilli was weak.[5/] Between this time and April 5th the Government became convinced that the representations

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5/ The Dade County authorities had problems with the initial arrest and search, which was based upon a tip from a confidential informant whose identity they wished to conceal. Pellon and Carilli were not apprehended at the time of the search. While one person aboard the vessel made a confession implicating them, he subsequently claimed it had been coerced. The Miami seizures have also been the subject of a suppression motion by defendant Pope in this case. See Memorandum Decision, 79 Cr. 164 (S.D.N.Y. June 28, 1979).

of Pellon and Carilli were correct and that the Dade County charges notwithstanding, the plan to apprehend Castrillion and the cocaine could forge ahead. To be on the safe side, however, the Government, on March 30th, presented to the Grand Jury in the Southern District of New York additional evidence sufficient to indict Carilli and his father for the prior narcotics conspiracy, and to add additional passport charges against Pellon. Although the Mt. Vernon police had just collaborated on the arrests, they were not asked to provide the federal agents with the results of their ongoing investigation which, by this time, had produced more evidence that could have been used against Pellon and Carilli.[6/]

6/ Interestingly, while the Drug Enforcement agents remained unaware of the prior dealings between Pellon and the Customs agents, the Mt. Vernon police were aware of them and had previously offered their cooperation to the Customs officers.

In any event, no new indictment was filed against the defendants.

Act II - "Striking A Hasty Bargain"

The negotiations with the defendants accelerated. On April 1st, Florida attorney Attias mailed a draft of a cooperation agreement to New York attorney Rukeyser and arrangements were made for a meeting on April 5th among all interested parties. Attias' proposal was quite broad and would have immunized the defendants "for any past or present activities . . . in connection with the violation of the narcotics laws." This suggestion was patently unacceptable to the United States Attorney's Office, since it was understood that the defendants had not divulged all of their prior illegal activities. Indeed, such incidents as the Miami fishing boat adventure were clear indications of suspicious, unexplained

activities by Pellon and Carilli. Moreover, an agreement was difficult to draft because only certain of the criminal activities known to the Government had already been the subject of indictments.

While the attorneys were arguing over the terms of the agreement and the draft was being hastily revised, constant pressure was put on the Government to conclude the agreement as soon as possible since the defendants claimed that Castrillion's cocaine supply was fast being distributed. According to Pellon, it had already dwindled to about 25 pounds. Again, the Government did not inquire how the defendants were able to keep daily track of Castrillion's alleged Florida transactions.

In addition to Assistant United States Attorneys Harris and Levin, the Chief of the Criminal Division, Fred Hafetz, was brought into the discussions.

They made a number of last-minute changes in the agreement and, at the last moment, Hafetz added a "breach provision" covering the possibility that the defendants would not live up to their end of the bargain. The agreement was then executed by the parties and their attorneys.

Although vague and incredibly badly drafted, the agreement provided that the defendants would "cooperate, supply information and work with the [U.S. Attorney] and the DEA" in the investigation of one Ernesto Castrillion. The defendants further agreed to follow any and all directives from the United States Attorney's Office and DEA regarding the investigation, and to testify in any resulting criminal trial, if necessary. (The plan was to avoid having them testify, if possible.)

In consideration of the defendants'

"truthful cooperation," and so long as their cooperation led to the arrest of Castrillion and the confiscation of 25 pounds of cocaine, the Government agreed not to prosecute Pellon on the then pending charges against him and, as to Carilli, the Government agreed to inform the sentencing judge in Florida of Carilli's cooperation. The Government also agreed, under the above conditions, not to bring "any further charges against Louis F. Pellon, Vincent D. Carilli or their families for any violations of the narcotics laws or passport laws . . . presently known to the USA and DEA."

Under the agreement, if Castrillion was not arrested with an appropriate seizure of cocaine, then the Government would be free to prosecute Pellon under the pending indictment, and to bring any additional charges "which [were] not connected with the activities" of Pellon and

Carilli "in their cooperation with the Government."

In sum, the agreement provided the defendants with what loosely could be characterized as "immunity" in three respects: 1) Pellon was not to be prosecuted on the existing Southern District indictment. (Carilli was merely to get assistance with respect to sentencing on his Florida charge, as to which he had recently pled guilty); 2) neither Pellon, Carilli, nor their families, were to be prosecuted "for any violation of the narcotics laws or passport laws of the United States of America [then] known to the USA and DEA"; and 3) neither of them were to be prosecuted for their activities "in their cooperation with the Government."

The first aspect can clearly be viewed as a simple nonprosecution agreement. The second aspect, since the additional activities then known to the Government were

not spelled out in the agreement, has a vaguely immunizing character.[7/] Both of these benefits, of course, were conditioned upon the ability of the defendants to produce Castrillion for arrest and confiscation of approximately 25 pounds of cocaine.

The need for the final protection, which was not conditioned upon a success-

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7/ In so doing, the Assistant United States Attorneys were violating the January 18, 1977 instructions of the Attorney General concerning preparations of agreements not to prosecute in return for cooperation. These instructions emphasize the need for learning all of the facts in order to weigh the relative culpability of the persons involved, and they direct the prosecutor to insist upon an offer of proof. Moreover, the instructions direct the attorney for the Government not to enter into such an agreement without explicitly limiting the scope of the Government's promise to specific charges, to insure that the agreement not to prosecute does not confer a "blanket" immunity on the witness. These instructions also require preparation of a written agreement which is sufficiently detailed to leave no doubt about the obligations of the parties under the agreement.

ful venture, is not immediately apparent. In acting as undercover informants, their actions should not have been considered criminal even if ostensibly so. Moreover, the use of the phrase "in their cooperation with the Government," (which changed Attias' original language which was "in effectuating the intents and purposes of this agreement") leads to the defendants' current contention that they were immunized as to all matters involved in their cooperation with the Government, including the information supplied prior to the written agreement.

For that matter, the "breach provision," which astonishingly had to be tagged on at the last minute, states simply that the agreement "is premised upon truthful cooperation during all phases of this investigation, including any Grand Jury or court proceedings which may arise . . . ." "Truthful cooperation"

is a phrase unique to this particular cooperation agreement. It might represent a shorthand expression for the usual promise of truthful testimony and full and complete cooperation. However, it seems to have been intended to require merely that the defendants, in the future, keep the United States Attorney's Office and the DEA agents fully apprised of what they were doing in arranging Castrillion's arrest.

No one has explained why the Government did not use its standard form of cooperation agreement. That agreement requires a full and complete disclosure of all prior criminal acts and truthful testimony in the future, as well as a promise not to commit any criminal acts in the future. A failure in any respect voids the agreement and leaves the Government free to prosecute the witness and to use his prior testimony against

him. The testimony of the Government attorneys involved in this case indicated that the combination of the unique circumstances existing at the time of the agreement, and the time pressures involved in consummating it, led to the use of an agreement drafted by defense counsel and modified by them. In their opinion, they were agreeing to give up only those violations (prosecutable matters) already known to them and already presented to a Grand Jury although not in all instances reduced to indictments. They acknowledge, however, that they have never before or since been involved in an agreement of this nature and that it is quite unique. In any event, it is apparent that, despite many striking warning signals, the Government's representatives were lulled into believing that they were dealing with some relatively insignificant local contacts for a major foreign narcotics

smuggler. That their assumption was unfounded was soon to become apparent.

Act III - "Relevation and Revenge"

On April 19, 1978, as a result of Pellon's and Carilli's cooperation, Ernesto Castrillion was arrested in New York City in possession of approximately 26 pounds of almost pure cocaine, the largest seizure made in the New York area in some time. Although Pellon assisted them in gaining entry to Castrillion's apartment, the agents attempted to conceal the fact that Pellon and Carilli had arranged the arrest. After his arrest, Castrillion made statements indicating his bewilderment as to why he had been told to bring the cocaine to New York and implying that it belonged not to him but to Pellon. His protestations were not taken too seriously by the Government representatives, although taped conversa-

tions that occurred before the arrest indicated that Pellon had to pay Castrillion $5,000 to entice him to bring the cocaine to New York. With these explanations, Castrillion attempted to make a separate deal of his own with the DEA concerning still other confederates, but with such a fine-feathered bird in the hand the DEA was not interested in his proposal.

As Castrillion's trial came on in June of 1978, the Government started to have difficulties dealing with Pellon. The prosecution had intended to avoid calling Pellon and Carilli as witnesses if possible, but certain exigencies seemed to require their appearance. As a result Pellon specifically requested formal use immunity concerning anything he might testify to at trial. He manifested an awareness that he had no full testimonial immunity at that time.

Attorneys Rukeyser and Attias also attempted to obtain formal use immunity for both clients, but their requests were refused, and the prosecutors indicated confusion as to why immunity should be necessary. When defendants' attorneys complained that the protection provided by the April 6th agreement was not sufficient to cover all possibilities, it was pointed out to them that they had originally drafted the agreement, and that if there were other potential liabilities involved they should have covered them at that time. Pellon continued balking to such an extent that he was not called as a prosecution witness at trial, but rather appeared at the defendants' request. Carilli testified for the Government, but at some points during their testimony both Pellon and Carilli claimed their Fifth Amendment privilege.

Castrillion was convicted and sen-

tenced to nine years' imprisonment. In early August the Government obtained a dismissal of the Southern District indictment against Pellon, although filing a disclaimed indicating that it was not satisfied with his cooperation.

In September, shortly after being sentenced, Castrillion apparently finally realized who had been responsible for his downfall and, not to be outdone, he, too, entered into a cooperation agreement with the Government. He advised the United States Attorney's Office that Pellon and his associates were not minor retailers in an illicit distribution chain, but were, in fact, major cocaine operators who had successfully imported and sold over 500 pounds of pure cocaine in the previous year. Moreover, with respect to his arrest, Castrillion advised the Government that the 26 pounds of cocaine seized had previously been sold to Pellon (al-

though not paid for) and was only a minute portion of the total Pellon had received. Castrillion, no doubt enjoying the surprise and chagrin he was causing, also stated that Pellon was continuing his narcotics business and was at that moment in the process of arranging a multi-million dollar deal with another Colombian cocaine smuggler.[8/]

Amazingly, but with an apt sense of irony, within a few days after making these revelations Castrillion departed from this drama by escaping from the Metropolitan Correctional Center in New York City. Needless to say, he has not been seen or heard from since.

8/ Apparently this other Colombian cocaine smuggler, one Gustave Davilla, was a friend of Castrillion who was willing to forego his own profits in order to assist Castrillion in gaining revenge upon those who had betrayed him.

Act IV - "Combined Counterstrike"

Through other confidential sources, and with a reassessment of matters previously known in light of Castrillion's information, the Government became convinced that it had been hoodwinked by Pellon and Carilli. After consultation with the Mt. Vernon police, and a frank exchange of information in its possession, a joint federal-state investigation was commenced. This investigation, an understandably vigorous one lasting several months, included the use of a number of state-ordered wiretaps and bugs planted in Pellon's Westchester warehouse.

Allegedly Pellon and his associates were not unaware of the shift in their fortunes. In fact, they are now charged with enlisting the assistance of a member of the Mt. Vernon police (defendant Frank Maurice) to keep them regularly informed of the progress of the new investigation.

They also allegedly hired an electronics company to sweep their premises for any trace of electronic surveillance and in a rather audacious tactic, they allegedly retained their own bugging expert in an attempt to overhear discussions in the Mt. Vernon police headquarters. By December they had apparently become aware of both the wiretaps and the existence of a bug, which they detected and rendered inoperable. At this point, the Government, which had been awaiting a major delivery from Colombia before making arrests, moved in with a number of state-authorized search warrants seizing little cocaine, but finding substantial documentary evidence and some weapons.

Initially, only a variety of state charges were brought against Pellon, Carilli, and certain of their associates. About a month later, however, this voluminous federal indictment, against four-

teen defendants, was filed. The conspiracy charge, Count I, charges 50 overt acts, at least 15 of which are alleged to have occurred before April 6, 1978 (the date of the cooperation agreement). Count 2 charges Pellon with a continuing criminal enterprise beginning in January, 1978. Count 3 charges Pellon and Carilli with a substantive narcotics violation occurring on March 7, 1978. Counts 8-10 and 11-12 charge Pellon and Carilli respectively with perjury in their testimony at the trial of Castrillion.

The overt acts in the indictment charge that Pellon and Carilli received 200 pounds of cocaine from Castrillion in Florida in early March, 1978, counted and repacked it, and then transported 100 pounds of it to Westchester County where, in early March and April, it was moved to a number of different locations. On March 12th, it is alleged, they agreed

with Sidney Pope that he would kill Castrillion and another Colombian in order to avoid the traditional requirement of paying for the cocaine (the Florida boat incident). Thereafter, during April and May, while they were supposed to be acting as Government undercover informants, they allegedly disposed of large amounts of cocaine and pocketed the proceeds. The indictment charges that during this same period the defendants transferred large sums of money from the United States to various bank accounts in the Bahamas. In addition, the state-ordered wiretaps apparently confirmed an attempt to import as much as an additional half ton of cocaine into the United States and also indicated that Pellon ran a narcotics distribution network with bases in Miami, Los Angeles, New Jersey, North Carolina, Georgia and Virginia.

Act V - "The Legal Legacy"

In the most substantial of the numerous pretrial motions in this case, Pellon and Carilli move to dismiss the indictment or, alternatively, to suppress all the evidence gained through the wiretaps and bugs. The basis for their motion is the April 6, 1978 cooperation agreement, which they argue immunizes them from this prosecution and forbids the prosecution's use or derivative use of their prior disclosures. Because Pellon and Carilli also assert that their cooperation with the Government will be their chief defense at trial, several of the other defendants move for severance, claiming that the assertion of such a defense will prejudice them. Additional severance motions on other grounds have also been made.

A. The "Immunity" Motions

Because of the unusual nature of the agreement, and the various interpretations of it offered by the parties, a lengthy hearing was necessary to develop the circumstances surrounding the negotiation and execution of it.

In the agreement, the Government makes an explicit promise not to bring any charges against these defendants for "any violations of the narcotics laws [then] known to the USA and DEA," as of April 6th. As stated earlier, many of the overt acts and several substantive charges in the present indictment allegedly occurred before that date, and the defendants' initial argument is that since the Government knew of some of these events, this prosecution is barred by the agreement.

The fallacy of the argument is apparent. The agreement did not contain a

promise by the Government not to use any of the information that had been developed prior to April 6th, but only promised not to prosecute for certain known violations of the law. Although what the Government "knew" as of April 6th is not facially clear from the document, on the basis of the evidence adduced at the hearing it is clear that the parties intended to protect the defendants from the charges in the pending Pellon indictment, to which Carilli and his father could have been added as named defendants, plus the additional passport charges which could have been added, on which the Grand Jury had already heard testimony. These were the "known" violations which concerned the parties in April, 1978.

Although the Government also had some information on other disconnected events, for example the Miami boat seizure, it did not have any awareness of

the surprising conspiracy now alleged in this indictment. Therefore, while the prosecution knew of certain events, otherwise innocuous on their face, it did not have enough information to place those events in context as overt acts in a narcotics conspiracy. Merely because some of the overt acts alleged in this indictment occurred before April 6, 1978 does not mean that the Government knew at that time that the defendants were engaged in a different and larger conspiracy simultaneous with their efforts to set up the arrest of Castrillion. Since the agreement immunizes only "known violations," the defendants cannot be protected from this indictment on the theory that some relevant information, otherwise innocent, was known by the prosecution on April 6th. It was not until Castrillion began to cooperate, after his conviction, that the Government attorneys

began to realize that they may have been double-crossed by the defendants' pursuit of an undisclosed conspiracy right under their noses.

This finding about what was known to the Government as of April 6th notwithstanding, the defendants assert a more interesting alternative theory to protect them from this prosecution. This theory is based on United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976). In Kurzer, the defendant had previously supplied information, on an assurance of use immunity, about the criminal activities of one Moe Steinman. Eventually, Kurzer was granted formal use immunity under 18 U.S.C. § 6002, and testified against Steinman in the Grand Jury. After Steinman was indicted, he began to cooperate with the Government and supplied new incriminating information about Kurzer, and Kurzer was then indicted on this basis.

The Second Circuit, although remanding for further hearing, held that if Kurzer's immunized testimony had effectively "caused" Steinman's cooperation, the indictment against Kurzer could not stand. This conclusion followed since, under those circumstances, Steinman's testimony was "indirectly derived" from Kurzer's own immunized testimony, and as such, was barred under the immunity grant. 534 F.2d at 515; see 18 U.S.C. § 6002. Because Kurzer was compelled by a grant of use immunity to testify in the face of his Fifth Amendment privilege, he must be left in "substantially the same position as if [he] had claimed the . . . privilege." 534 F.2d at 516, quoting Kastigar v. United States, 1406 U.S. 441, 462 (1972). On remand, the district court adhered to its earlier holding that Steinman's cooperation had been induced by his indictment and therefore was the

product of a derivative use of Kurzer's immunized testimony, and dismissed the indictment against Kurzer. 422 F. Supp. 487 (S.D.N.Y. 1976).

Simply stated, Pellon and Carilli argue that Castrillion is to them as Steinman was to Kurzer. They contend that the information they disclosed and the actions they took in facilitating Castrillion's arrest should be afforded a "use immunity type" shield, so that Castrillion's incriminating disclosures about them are barred as the indirect product of their own cooperation. Since the wiretap evidence in this case was based in substantial part on warrants supported by Castrillion's information, the defendants also argue that the evidence should be suppressed as the result of an illegal use of their own prior disclosures and cooperation.

To make this argument, of course, the

defendants must first establish that a type of use immunity existed for their disclosures to the Government in the spring of 1978.[9/] This they have tried to establish in two ways. First, they contend that the April 6th agreement contains an implicit grant of use immunity, and second, that even if it does not, the agreement in effect gave them a type of "transactional" immunity, which by definition includes the equivalent of use immunity. Cf. United States v. Quatermain, 467 F. Supp. 782 (E.D. Pa. 1979), appeal docketed, No. 79-1253 (3d Cir. Feb. 26, 1979). In short, since their cooperation resulted in the Govern-

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9/ Unlike Kurzer, in this case the Government has not disputed the chain of causation between Castrillion's conviction and his motive to incriminate Pellon and Carrilli. Therefore, if Pellon and Carilli did enjoy a full use immunity for their disclosures, under Kurzer Castrillion's information would be an indirect product for the defendants' disclosures.

ment seizing Castrillion and 26 pounds of cocaine, the Government cannot now use Castrillion's information to prosecute them.

The difficulty with the first branch of the argument is that nowhere in the agreement does the Government promise anything approaching use immunity in the usual sense. If the prosecution had made such an explicit promise in return for testimony, of course, it would be enforceable to the same extent as a formal grant of immunity under section 6002. See, e.g., United States v. Kurzer, supra, 534 F.2d at 513 n.3; United States v. Galanis, 429 F. Supp. 1215 (D. Conn. 1977), rev'd on other grounds, 568 F.2d 234 (2d Cir. 1977 (habeas petition). See also United States v. Nussen, 531 F.2d 15 (2d Cir.), cert. denied, 429 U.S. 839 (1976).

In the instant case, however, the

evidence does not support the conclusion that the Government made such a promise to these defendants. Initially, it is apparent that their cooperation was not "compelled" from them over their invocation of the Fifth Amendment. They approached the Government voluntarily, and bargained for as much as they could get in return for their information. They received dismissal of an indictment and a promise not to bring certain other charges, and for these benefits, they were willing to cooperate. In addition, at the time the agreement was signed, there was no intention to have the defendants testify at Castrillion's trial, so that a testimonial protection was not seen as a necessity. Further, the Government knew that it was not aware of all the criminal histories of these defendants, and a request for full-fledged use immunity, even if one had

been made at the time, would probably not have been acceptable to the Government.

Similarly, the promise by the Government not to prosecute the defendants for any activities "in their cooperation with the Government" was clearly intended only to assure the defendants that they would not be prosecuted for anything they did at the direction of the DEA in aiding the arrest of Castrillion and the seizure of the cocaine.[10/] The phrase was not intended to apply to all the previous bits and pieces that the defendants had supplied to the Government up to that point,

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10/ As mentioned earlier, it is unclear why such a promise of nonprosecution was even necessary, for by definition, if the defendants were acting under the direction of Government agents, they would not have the necessary intent to be guilty of criminal offenses. Nevertheless, Pellon and Carilli wanted such a promise in the agreement, and the Government went along using the vague phraseology: "in their cooperation with" the Government.

nor can it be characterized as providing "transactional immunity" as that term is generally understood. Transactional immunity, like use immunity, is generally offered by the Government in return for testimony that, because of the witness' Fifth Amendment privilege, would be otherwise unavailable. The difference between transactional immunity and use immunity is that in the former, the witness is protected completely from prosecution for any offense about which he testifies. Use immunity is not as broad; it precludes only the Government's use of the testimony, and the witness may still be prosecuted if the prosecution can prove its case independently of the witness' own testimony. See generally Kastigar v. United States, 406 U.S. 441, 449-53 (1972).

In any event, the Government's promise in this case, not to prosecute for

certain known offenses or for actions aiding in Castrillion's arrest, clearly do not amount to a promise of transactional or use immunity. But cf. United States v. Quatermain, supra.[11] Con-

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11/ In Quatermain, now on appeal to the Third Circuit, the defendant had voluntarily offered his cooperation against his future incriminator in return for a vague promise of "immunity from prosecution" for his participation in crimes "relating to the manufacture of methamphetamine." 467 F. Supp. at 787. The court held this open-ended promise to be the equivalent of a grant of full transactional, and use, immunity. There were apparently no charges against the defendant pending at the time of his agreement, however, so that the Government's promise termed explicitly as "immunity," was even more vague than the one in this case. Moreover, the Government seems to have conceded in that case that that agreement provided a testimonial immunity (indeed, insisting that it was "use immunity"), but also took the inconsistent position that the immunity was somehow limited to a particular subject matter. See id. at 787 & 788. Finally, the defendant was not represented by counsel at the time of his negotiations, and the court was willing to construe ambiguities in his favor.

(Continued)

cerning disclosures made before April 6th, the agreement cannot reasonably be interpreted as a promise of retroactive use and derivative use immunity.[12/] As to events expected to occur after April 6th, the need for a testimonial immunity was simply not apparent, nor was it requested. Indeed, under the agreement the defendants were not required to incriminate themselves through their own testimony or actions; they were required only to help

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For these reasons, Quatermain is distinguishable. If it may be interpreted as equating simple nonprosecution agreements with grants of full-fledged testimonial immunity, however, this Court respectfully disagrees.

12/ In addition, during his testimony at Castrillion's trial, Carilli clearly indicated his belief that, up until April 6th, he had no agreement in effect with the Government. He admitted fabricating parts of his pre-April 6th disclosures, because he "did not feel obligated to tell the truth at [that] time since I had no agreement with the DEA."

in the prospective arrangements for the arrest of Castrillion. The Government's promises simply do not amount to a guarantee that anything derived from that arrest could not later be used against the defendants.

Moreover, the defendants' post-agreement conduct belies their present claim of immunity. Both defendants made specific requests for formal use immunity when it became apparent that they might testify at the Castrillion trial, indicating their awareness that the April 6th agreement did not provide such complete protection. Both requests were refused. Finally, both defendants in fact invoked the Fifth Amendment at Castrillion's trial whenever the questions called for incriminating responses outside the scope of Pellon's prior indictment, on which they knew they would not be prosecuted. While

the prosecutor at that trial argued that Pellon and Carilli could not invoke the privilege about the transactions alleged in the prior indictment, he did not dispute their invocation of it in any other respect, and certainly did not represent to the court that the defendants would be protected from prosecutorial use of anything they said.

Even with the help of Kurzer, therefore, Pellon and Carilli are not protected from this prosecution because they never received a promise of full use immunity for their disclosures to the Government. Instead, what they bargained for and what they received was a simple agreement not to prosecute certain known violations in return for their cooperation. In other contexts, courts have recognized that a promise not to prosecute, in return for cooperation and testimony, is not the equivalent of the

broad immunity required constitutionally to compel a person to testify over a claim of privilege. See e.g., United States v. Jenkins, 470 F.2d 1061 (9th Cir. 1972), cert. denied, 411 U.S. 920 (1973); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967). The defendants' argument, if accepted, would elevate every simple nonprosecution agreement to the level of a full grant of testimonial immunity. Such a conclusion would be unprecedented and untenable.

These defendants offered their cooperation to the Government voluntarily and with full knowledge of what they were promising and what benefits they would receive. They were not compelled, over their invocation of the Fifth Amendment, to do anything that they did not willingly agree to do. Under these circumstances, the defendants got what they bargained for,

and deserve no more than that. Cf. United States v. Stirling, 571 F.2d 708, 732 (2d Cir.), cert. denied, 99 S. Ct. 93 (1978) ("[O]nce the agreement is finalized its terms will be enforced."). 13/ While one would expect better draftsmanship in important prosecutorial agreements, and more prosecutorial prudence before "striking a bargain with the devil," the shortcomings of the prosecutors do not warrant letting the wrongdoers go free.

The Government also argues that even if the agreement were construed to afford the defendants use immunity for their dis-

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13/ Apparently because the Government has not stated that it intends to offer at trial any of the prior statements of the defendants made during the negotiations, defendants have not raised an argument under Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410. See generally United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978) (en banc); United States v. Arroyo-Angulo, 580 F.2d 1137 (2d Cir., cert. denied, 99 S. Ct. 285 (1979).

closures and cooperation, they breached the agreement by not cooperating fully and truthfully. Under this rationale, the Government contends that the agreement becomes void, and the defendants can be prosecuted for any and all of their crimes. Since a pretrial attempt by the Government to establish this claim would effectively require proof of the prosecution's entire case against the defendants (which it is estimated will take a month or more), the Government has not pursued this argument at this time. Nevertheless, it may well be that after trial, the Court will be in a position to evaluate this additional contention and rule on it. Accordingly, the Court will reserve decision on this alternative ground until the trial has concluded and the parties have been given an opportunity to

submit briefs on the issue.[14/]

For the foregoing reasons, the defendants' motions to dismiss and to suppress, on the basis of the April 6th agreement, are denied.

B. The Severance Motions

Four defendants, Michael Smith, Frank Pereira, Sidney Pope and Jay Gray, move for severance under Fed. R. Crim. P. 14. All of them assert that they were minor players in the drama and that the "spill-over" from the evidence against the more culpable defendants will prejudice them. Smith, Pereira and Pope also assert that Pellon and Carilli's defense

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14/ Although a defendant who breaches an immunity agreement generally may be prosecuted only for perjury in his testimony, see Kuzer, 534 F.2d at 518, the breach of a simple plea bargain or nonprosecution agreement may lead to different consequences. See, e.g., United States v. Stirling, 571 F.2d 708 (2d Cir.), cert. denied, 99 S. Ct. 93 (1978).

of cooperation with Government agents will be antagonistic with their defenses. Finally, Smith claims that if there were separate trials, Pellon and Carilli would offer testimony exculpating Smith.

As to the "spill-over" ground, the defendants' assertions are no more than the usual claims that they might fare better if severed. See United States v. Stirling, supra, 571 F.2d at 733. None has met the "heavy burden" of showing clearly that substantial prejudice will result from a joint trial, or that the jury, properly instructed, will be unable to measure guilt or innocence separately as to each defendant. See United States v. Ricco, 549 F.2d 264, 270-71 (2d Cir. 1977); United States v. DeSapio, 435 F.2d 272, 280 (2d Cir. 1970), cert. denied, 402 U.S. 999 (1971). In short, none of the defendants has made a showing sufficient to cause "abandonment

of the general rule that persons jointly indicted may be jointly tried . . . . " United States v. Lyles, 593 F.2d 182, 191 (2d Cir. 1979), cert. denied, 47 U.S.L.W. 3636 (U.S. Mar. 26, 1979). Of course, the Court will reconsider its ruling in this regard should any new facts in support of defendants' positions develop prior to, or at trial.

A similar conclusion must be reached as to the claims of antagonistic defenses. Of the defendants who make this argument, only defendant Smith sets forth what his allegedly inconsistent defense will be, namely, he will admit to certain transactions alleged in the indictment, but will deny the criminal intent necessary for guilt.

It is difficult to see how this defense would be antagonistic to Pellon and Carilli's alleged defense that they were operating as undercover agents for the

Government. Indeed, the defenses do not seem antagonistic at all on the facts as contended in support of the motion. The other defendants do not even state what their allegedly antagonistic defenses will be. Under these circumstances, there is no basis for granting a severance.

Finally, defendant Smith contends that at a separate trial, Pellon and Carilli would testify on his behalf. This presents the most troublesome severance issue. The Government properly points out, however, that Pellon and Carilli, in their affidavits in support of Smith's motion, do not state explicitly that they would waive their Fifth Amendment privilege at a separate trial of Smith. Instead, they state only what their allegedly exculpatory testimony would be. Even assuming that their direct testimony would be probative in countering

the Government's evidence against Smith,[15/] their failure to waive the privilege generally could so restrict cross-examination that their direct testimony should not be considered. Without a guarantee that they would waive the privilege, of course, the value of the testimony is speculative. See, e.g., United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976). In addition, given the broad scope of legitimate cross-examination, it may well be that their credibil-

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15/ Smith's attorney argues that the Court should "examine in camera the evidence." It is not clear how this could be accomplished. Most evidence is testimonial, and not yet given. Moreover, since Smith is a defendant in the conspiracy count, which has 50 overt acts and involves a multitude of recordings of wire taps and bugs (not yet completely transcribed), a review of the 3500 materials and transcripts alone would take a week or more.

ity would be so diminished that their direct testimony would not be very effective.

Even if it were clear that Pellon and Carilli would waive their privilege, however, it is impossible at this point to evaluate the probity of their proffered testimony. The Court has not yet heard the Government's evidence against Smith and, therefore, is not now in a position to weigh the damage, if any, to Smith's defense resulting from the loss of Pellon and Carilli's testimony. This factor, coupled with the uncertainty regarding waiver of the Fifth Amendment, make Smith's contentions too speculative to consider at this time.

Accordingly, Smith's motion (and the other motions for severance) are denied without prejudice to renewal at the conclusion of the Government's case, when the factual situation is settled and the

potential of prejudice from a joint trial is more apparent.

SO ORDERED:

Dated: New York, N.Y.,
August 3, 1979.

S/ Gerard L. Goettel

U.S.D.J.

Supreme Court, U. S.
FILED
MAY 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1493

In the Supreme Court of the United States

OCTOBER TERM, 1979

LOUIS F. PELLON AND VINCENT D. CARILLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2aa) is not yet reported. The opinion of the district court (Pet. App. 3a-69a) is reported at 475 F. Supp. 467.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1980. The petition for a writ of certiorari was filed on March 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a no-prosecution clause in the cooperation agreement between these petitioners and the government should be construed to include a grant of use and

derivative use immunity, so that evidence obtained as an indirect result of petitioners' cooperation would be inadmissible against them in a prosecution for activities falling outside the agreement.

STATEMENT

In March 1979, a 12-count indictment was returned in the Southern District of New York charging petitioners and 12 co-defendants with possession with intent to distribute and distribution of cocaine (21 U.S.C. 841(a)(1)), engaging in a continuing criminal enterprise (21 U.S.C. 848), conspiracy to violate the narcotics laws from January 1978 until the filing of the indictment (21 U.S.C. 846), use of the telephone to facilitate a felony (21 U.S.C. 843(b)), and perjury (18 U.S.C. 1623).

On April 6, 1979, petitioners moved alternatively to dismiss the indictment or to suppress all evidence obtained through the use of state court-authorized wiretaps, alleging that an April 1978 government cooperation agreement had immunized them from prosecution and barred use of the wiretap evidence. The district court denied petitioners' motions after a nine-day evidentiary hearing, finding that the agreement neither immunized petitioners nor precluded use of the wiretap evidence (Pet. App. 3a-69a).

On August 22, 1979, petitioners pleaded guilty to Counts One and Two (conspiracy and continuing criminal enterprise) of the indictment, but preserved their right to appeal the denial of their pretrial motions. Petitioner Pellon was fined $100,000 and sentenced to seventeen and one-half years' imprisonment. Petitioner Carilli was sentenced to ten years' imprisonment and ten years' special parole. The court of appeals affirmed (Pet. App. 1a-2aa).

The district court's opinion thoroughly discusses the facts that were adduced at the evidentiary hearing (Pet. App. 3a-69a). In December 1977, Carilli was arrested at Miami International Airport while smuggling cocaine into the country. Shortly thereafter, Howard Rukeyser, a New York attorney representing Carilli, contacted Frederick Marano, a DEA agent in New York, and told him that Carilli might be willing to cooperate with DEA (Tr. 20-21).[1]

Rukeyser, Carilli and Pellon met with several DEA agents on December 15, 1977. After petitioners had been given *Miranda* warnings, they indicated that they could help with the arrest of Ernesto Castrillon, a Colombian cocaine dealer, and the seizure of approximately 500 pounds of cocaine (Tr. 35, 426-429). In exchange, Carilli and Pellon wished Carilli's smuggling charges to be dropped (Tr. 544-545, 644-645).

Rukeyser and the United States Attorney's Office continued negotiations. Rukeyser and Pellon attempted, however, to strike a better bargain with the Customs Bureau (Tr. 709-711). In late January, Carilli and Assistant United States Attorney Jo Ann Harris reached a tentative agreement whereby the government would forgo prosecuting Carilli in the Southern District of New York, as well as help him with respect to his Florida indictment, in exchange for his complete and truthful testimony (Tr. 1306-1307). Harris refused to promise that Carilli's statements would not be used against Pellon (Tr. 1307-1308). Thereafter, Carilli provided some information about his and Pellon's involvement in cocaine dealing.

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[1] "Tr." refers to the transcript of the evidentiary hearing. "Br. A." refers to the appendix attached to the government's brief in the court of appeals.

Carilli did not sign the written agreement, however, and he eventually informed Harris that he was seeking a better bargain in Florida. The agreement was then terminated (Tr. 1309-1313).

In February 1978 Pellon was charged with a narcotics conspiracy in the Southern District of New York based on Carilli's statements to the government. Carilli was named as an uncharged co-conspirator (Tr. 1309; Gov. Exh. 7). On March 7, moreover, the government indicted Pellon for possession and distribution of cocaine, conspiracy, and a passport violation (Tr. 1324; Gov. Exhs. 9, 10).[2] In mid-March, Carilli and Pellon approached AUSA Harris through Jack Attias, a Florida attorney, and again offered their cooperation in apprehending Castrillon (Tr. 1318-1321, 1330-1331). Negotiations resumed, and the government eventually offered to drop Pellon's indictment and refrain from adding Carilli and members of his family as defendants, if Castrillon were arrested with a large amount of cocaine. Otherwise, the government would proceed with petitioners' prosecution (Tr. 1337-1338). The government then learned that Florida authorities had issued arrest warrants for Pellon and Carilli on charges of conspiracy to commit murder (Tr. 1343). While the government immediately broke off negotiations (Tr. 122-123), petitioners denied the allegations and claimed that they had been in Florida to facilitate Castrillon's arrest (Tr. 111-112, 584). In early April, the United States Attorney's Office learned that Florida did not intend to

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[2]The government had additional information concerning petitioners' narcotics activities from an undercover investigation that had been initiated in October 1977 as a result of cooperation by an informant. Rukeyser was eventually informed of this investigation and the information that it had produced. At this time, however, the government still had no idea that petitioners were major drug dealers (Tr. 1316-1317, 308-309, 735-736, 913).

prosecute petitioners, because of insufficient evidence. It was therefore decided to proceed with the cooperation agreement.

On April 1, 1978, Attias sent Rukeyser a draft cooperation agreement, and a meeting with the government was set for April 5 (Tr. 1350-1351). Attias' proposal would have immunized petitioners "for any past or present activities * * * in connection with the violation of the narcotics laws" (Br. A. 4a). This language was unacceptable to the government attorneys, who re-drafted the provision to state only that the government would not bring "any further charges * * * for any violation of the narcotics laws or passport laws * * * *presently known* to the USA and DEA" (Pet. 12; emphasis supplied). The agreement also provided that Pellon would not be prosecuted on the existing federal indictment in New York; that Carilli's cooperation would be made known to the sentencing judge in Florida, where he had pleaded guilty to one count of that federal indictment; and that neither Pellon nor Carilli would be prosecuted for their activities "in their cooperation with the Government" (Pet. 12-14). In exchange, petitioners would cooperate in the investigation of Castrillon and would testify, "if necessary," for the prosecution (Pet. 11-12). If Castrillon were not arrested with an appropriate amount of cocaine, however, the government would be free to prosecute Pellon under the pending New York indictment and bring any additional charges "which [were] not connected with [petitioners'] activities * * * in their cooperation with the Government" (Pet. 14). Finally, the government added a provision that conditioned the entire agreement upon petitioners' "truthful cooperation during all phases of this investigation" (Pet. 17). The final agreement was signed on April 6, 1978.

Castrillon was arrested in New York City on April 19, 1978, with approximately 26 pounds of almost pure cocaine in his possession (Tr. 334-336, 370-374). Prior to Castrillon's trial, petitioners requested formal use immunity with respect to their expected testimony (Tr. 1418, 1426-1434, 1713, 1718). The prosecutors refused to recommend immunity, however, on the ground that the April agreement would not be rewritten and petitioners could assert their Fifth Amendment privilege, in any event, with respect to any potential liabilities that were not covered by the agreement (Tr. 1421, 1426-1434, 1470, 1712-1719). Petitioners subsequently testified, but both asserted their Fifth Amendment privilege on questions beyond the scope of the pending indictment against Pellon (Tr. 1726-1732). Castrillon was convicted and sentenced to nine years' imprisonment.[3]

After Castrillon was sentenced, he cooperated with the United States Attorney's Office and gave information about petitioners' previous and then-ongoing narcotics activities (Tr. 320). This information indicated that, contrary to what the federal authorities had been led to believe, petitioners were the central figures in a massive illegal drug distribution operation. Castrillon's cooperation resulted in a joint federal-state investigation, which included the use of several state ordered wiretaps. Petitioners and certain other persons were arrested on New York State narcotics charges in December 1978, and this federal indictment followed about three months later.

[3]The government assisted Carilli with respect to his federal prosecution in Florida, and he received probation in that case. In August 1978 the government secured a dismissal of the indictment against Pellon in New York.

Among other things, the indictment charged that in early March 1978 Castrillon delivered 200 pounds of cocaine to petitioners in Florida and that they transported 100 pounds of it to Westchester County, New York. They allegedly plotted the murder of Castrillon to avoid paying for the cocaine, which they sold in large amounts during April and May, while they were ostensibly working as government informants (Pet. App. 42a-43a).[4]

ARGUMENT

1. On April 6, 1978, petitioners entered into an informal no-prosecution agreement that was conditioned upon their "truthful cooperation during all phases of this investigation." At the very moment they signed the agreement, however, petitioners were engaged in a massive narcotics conspiracy, which they concealed from the government, and which obviously would have made that agreement unthinkable if the government had known about it. With characteristic resourcefulness, petitioners nonetheless contend (Pet. 24-25) that their no-prosecution agreement should be construed to include a grant of use and derivative use immunity, so that the fruits of their "cooperation"—including the subsequent cooperation of Castrillon and the information derived therefrom—should be barred from use against them. While petitioners base that contention on the assertion that every no-prosecution agreement is equivalent to a full grant of testimonial immunity under 18 U.S.C. 6002, they cite no authority for that proposition, which the district court correctly found

[4]The state-ordered wiretaps apparently disclosed that Pellon had a narcotics distribution network encompassing several states from Florida to New Jersey and California (Pet. App. 43a).

to be "unprecedented and untenable" (Pet. App. 60a).[5] Moreover, the district court concluded after an extensive evidentiary hearing that this particular agreement neither precluded petitioners' prosecution nor "promise[d] anything approaching use immunity in the usual sense" (Pet. App. 52a). The promise not to prosecute covered only those violations that were known to the government on April 6, 1978, and petitioners do not challenge the court's finding that the government had no knowledge at that time of the broad-based conspiracy charged in this indictment, although it is conceded that some of the overt acts did occur before that date (Pet. App. 46a-48a).

The court also properly found that the agreement did not implicitly promise use immunity. The negotiations leading to the agreement were initiated by petitioners, who bargained for specific benefits in exchange for their information. The agreement itself did not require

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[5]Petitioners' assertion (Pet. 26-32) that a conflict in the circuits exists on this issue is insubstantial. In *United States* v. *Quatermain*, 613 F. 2d 38 (3d Cir. 1980), petition for cert. pending, No. 79-6204, the district court excluded evidence on the ground that the particular informal immunity agreement there should be construed as conferring use immunity. The district court formulated no categorical rule, however, and the Third Circuit did not consider even whether the particular agreement provided use immunity because it reversed on the ground that evidence of an unrelated crime would not be suppressed even if the particular agreement provided for use immunity. Insofar as petitioners contend that the decision below is inconsistent with *United States* v. *Kurzer*, 534 F. 2d 511 (2d Cir. 1976), which involved a formal grant of use immunity under 18 U.S.C. 6002, it is well established that intra-circuit conflicts do not warrant review on certiorari. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, petitioners' reliance on *Kurzer* is misplaced in that the Second Circuit upheld the government's position in that case and remanded for further proceedings in the district court.

petitioners to incriminate themselves through testimonial or demonstrative acts, since it required only that they assist the government in arranging Castrillon's arrest.[6] Consequently, petitioners had no obvious need for testimonial immunity, and they received none (Pet. App. 53a-58a). Indeed, petitioners' specific request for formal use immunity during Castrillon's trial indicates that they fully understood the limited scope of their agreement. Finally, petitioners both invoked their Fifth Amendment privilege when asked at Castrillon's trial about events that were beyond the scope of Pellon's prior indictment, again demonstrating their recognition that they had no protection for their wide-ranging narcotics activities, which were unknown to the government (Pet. App. 58a-59a). In sum, the district court had ample basis for its conclusion (Pet. App. 60a-61a):

> These defendants offered their cooperation to the Government voluntarily and with full knowledge of what they were promising and what benefits they would receive. They were not compelled, over their invocation of the Fifth Amendment, to do anything that they did not willingly agree to do. Under these circumstances, the defendants got what they bargained for, and deserve no more than that.[7]

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[6]The agreement required that petitioners testify against Castrillon "if necessary," but it did not require that petitioners incriminate themselves. That fact, which was clear from the agreement, was further elaborated when the government refused petitioners' request for immunity for their testimony and told them they were free to assert the Fifth Amendment privilege if they were concerned about possible inquiries into activities not covered by the agreement (see page 6, *infra*).

[7]The district court also later found that both petitioners had "violated the agreement egregiously" (Tr. Sentencing of Carilli 15-16; Tr. Sentencing of Pellon 19).

2. Petitioners further contend (Pet. 25, 33-34) that the district court's interpretation of the agreement amounts to a holding that petitioners implicitly waived their privilege against self-incrimination by signing the agreement. That argument simply misstates the court's holding. By holding that petitioners had no Fifth Amendment privilege regarding their activities in assisting the government with Castrillon's arrest, the court did not hold that they had waived their Fifth Amendment rights. Instead, the court simply recognized that, to the extent that petitioners were protected from prosecution for the activities involved in the Pellon indictment, as well as for their activities as government agents in setting up Castrillon's arrest,[8] the agreement had removed their risk of incrimination as to those activities, and they had no need to invoke the privilege. A claim of privilege is valid only if a witness's responses would expose him to a real and substantial danger of incrimination. See, *e.g.*, *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968).

Petitioners were not in any way held to have waived a valid Fifth Amendment privilege. In fact, they successfully asserted the privilege with respect to those activities for which they were subject to a risk of incrimination.

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[8]As the district court pointed out, it was unclear why a promise of no-prosecution was necessary for petitioners' conduct as undercover government agents, since they would not have had the necessary intent to be guilty of criminal offenses (Pet. App. 54a n.10). Even without the agreement, therefore, petitioners would have had no valid Fifth Amendment claim if asked to testify about those activities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1980

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